

MINUTES
Uniformity Committee Meeting
Thursday, April 25, 2019

Embassy Suites Denver Downtown Convention Center
1420 Stout Street
Denver, Colorado

Welcome and Introductions

Tommy Hoyt, Tex., ascending Chair of the uniformity committee, opened the meeting at 8:00 a.m. He expressed the committee's gratitude to Holly Coon for her service as the former chair, and introduced her as the new MTC Joint Audit Director. The following people were in attendance:

Michael Emfinger	Alabama Department of Revenue
Deanna Munds-Smith	Arkansas Department of Finance and Administration
Laurie McElhatton	California Franchise Tax Board
Betsy Clancy	Colorado Department of Revenue
Michael Hathaway	Colorado Department of Revenue
Erika Hoxeng	Colorado Department of Revenue
Josh Pens	Colorado Department of Revenue
Misgana Tesfaye	Colorado Department of Revenue
Steven Alvarez	Georgia Department of Revenue
Ken Roberts	Idaho State Tax Commission
Tom Shaner	Idaho State Tax Commission
Randy Tilley	Idaho State Tax Commission
Amber Kauffman	Idaho State Tax Commission - Office of the Attorney General
Elisa Magnuson	Idaho State Tax Commission - Office of the Attorney General
Nathan Nielson	Idaho State Tax Commission - Office of the Attorney General
Phil Skinner	Idaho State Tax Commission - Office of the Attorney General
Brian Fliflet	Illinois Department of Revenue
Hristo Chaprazov	Iowa Attorney General's Office
Ben Clough	Iowa Department of Revenue
Alana Stamas	Iowa Department of Revenue
Todd Renner	Kentucky Department of Revenue
Jennifer Hays	Kentucky Legislative Research Commission
Krystal Bolton	Louisiana Department of Revenue
Renee Nacrelli	Maryland Office of the Attorney General
Maria Sanders	Missouri Department of Revenue
Salvatore Tomaselli	Missouri Department of Revenue
Chris Fehr	Missouri Department of Revenue
Dan Whyte	Montana Department of Revenue

Lee Baerlocher	Montana Department of Revenue
Chris Barber	Multistate Tax Commission
Richard Cram	Multistate Tax Commission
Lila Disque	Multistate Tax Commission
Cathy Felix	Multistate Tax Commission
Bruce Fort	Multistate Tax Commission
Keith Getschel	Multistate Tax Commission
Brian Hamer	Multistate Tax Commission
Helen Hecht	Multistate Tax Commission
Jantha Jamison	Multistate Tax Commission
Lawence Shinder	Multistate Tax Commission
Jeffrey Silver	Multistate Tax Commission
Marshall Stranburg	Multistate Tax Commission
Steve Yang	Multistate Tax Commission
Holly Coon	Multistate Tax Commission
Jacob Thom	New Hampshire Department of Revenue Administration
Donna Whitcomb	State of New Hampshire
Dan Armer	New Mexico Taxation & Revenue Department
Janice Davidson	North Carolina Department of Revenue
Ray Langenberg	Texas Comptroller of Public Accounts
Tommy Hoyt	Texas Comptroller of Public Accounts
Frank Hales	Utah State Tax Commission
John Valentine	Utah State Tax Commission
James Savage	Virginia Tax Department
David Hesford	Washington Department of Revenue
Gil Brewer	Washington State Department of Revenue
Timothy Waggoner	West Virginia State Tax Department
Michelle Biermeier	Wisconsin Department of Revenue
Jayne Kulberg	Wisconsin Department of Revenue
Tripp Baltz	Bloomberg Tax
Ryan Prete	Bloomberg Tax
Karl Frieden	Council On State Taxation
Joe Huddleston	Ernst & Young, LLP
Stephanie Do	Eversheds Sutherland (US) LLP
Michael Hilkin	Eversheds Sutherland (US) LLP
Virgil Helton	Fast Enterprises
John Mollenkamp	Intuit
John Auan	Jones Day
Phillip Horwitz	Moss Adams
Bruce Johnson	Taxometry
By Phone:	
Michael Fatale	Massachusetts department of Revenue

Audrey Tyndall-Hoyle	New Jersey Division of Taxation
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Initial Public Comment Period

There was no public comment.

Approval of Minutes of Uniformity Committee Meeting on November 7, 2018

Laurie McElhatton, Cal., moved for approval of the minutes as written. The motion passed by unanimous voice vote.

Report of Staff on State Developments Related to Uniformity Efforts

Helen Hecht, MTC General Counsel, summarized her written report, noting that it had been five years since the committee heard the report of the strategic planning task force on ideas for improving the committee's work. Since that time, the committee has taken steps to implement those ideas. Richard Cram, MTC Director of Nexus, reported on the Marketplace Facilitator work group. He was hopeful that the attendees found his white paper helpful in enacting legislation. While there has not been complete uniformity, many legislative actions have shown similar features.

Report of the Combined Reporting – Finnigan Work Group

The work group presented its written status report. The work group, following the direction of the Uniformity Committee, is using a "single-entity" approach that would generally allow the sharing of net operating losses (NOLs) between members of the unitary group. Questions have been raised as to whether sharing of NOLs should be permitted. Nikki Dobay, COST, expressed COST members' strong belief that there should be NOL sharing. The group discussed a letter submitted by Michael Fatale, Mass., asking "whether changes to the Model to effectuate the Finnigan sourcing principle necessarily require wholesale changes to the Model allowing for the sharing of NOL carry forwards and credits." Michael also commented that the model need not include provisions addressing NOLs and the group could, instead, prepare some sort of white paper. Laurie McElhatton suggested that the draft could include two options, one for sharing and one that would not allow sharing. Phil Skinner, Idaho, suggested that one option might be to include a drafter's note that says that states can decide how to handle NOLs individually. Matt Peyerl, N.D., pointed out that there are different rules on how states deal with NOLs, which are arguably more important than Joyce/Finnigan to the states. Ms. Dobay argued the model should address the issue. Bruce Johnson, Taxometry, stated if there are to be alternative provisions, it is better to have those options (Streamlined calls them toggles) set out in language in the draft. Randy Tilley, Idaho, moved to return the draft to the working group to discuss the options related to NOL sharing. The motion passed by show of hands.

Report of the P.L. 86.272 Work Group

Brian Hamer, MTC Counsel, discussed the written report of the work group. The work group's mission is to update the MTC statement of information on applying PL 86-272, given subsequent changes to the economy and how business has evolved. Mr. Hamer went over example 3A from his materials (Seller maintains a website offering for sale only items of tangible personal property. The products are covered by a warranty. If a product ceases to function properly during the warranty period...Seller is able to fix the product remotely via the internet and WIFI (e.g., fixing a remote-control device that controls a bed's position)). He asked the room whether the seller has engaged in a protected activity. A majority of people believed it was unprotected.

Virgil Helton cautioned against mixing software and tax, because those two ways of thinking can be confusing and when we start splitting hairs regarding the method of communication. He recommended treating them all the same. Bruce Johnson agreed but noted that the world doesn't work that way because PL 86-272 doesn't allow that. Joe Huddleston, EY, noted the examples are useful for the angle the group is trying to take, at least for discussion.

Audrey Tyndall-Hoyle, N.J., noted that effective July Amazon will be taking returns in its brick and mortar stores. What does that do to 86-272 protection of Amazon's vendors? She encouraged the group to take this into consideration.

Lunch - Provided

Roundtable Discussion - All

All state representatives present were encouraged to share their state's legislative and regulatory developments in the area of taxing multistate businesses. The majority of discussion involved the end of state legislative sessions and efforts to tax digital goods.

Report of MTC Staff on Two Developments Affecting Uniformity

(a) Federal Digital Goods Bill – Sourcing Digital Goods and Services

Mr. Hamer presented on the Digital Goods and Services Tax Fairness Act of 2019 (S. 765/H.R. 1725), which recently was introduced in both houses of Congress and which closely mirrors prior iterations of the bill. He suggested the Uniformity Committee may wish to initiate a project (i) to study the various approaches used by states to source digital goods and services for purposes of sales/use taxation and then (ii) to develop a model sourcing statute that would incorporate best practices.

(b) State Economic Substance Doctrine

Bruce Fort, MTC Counsel, presented. At the conclusion, Mr. Johnson argued that if Congress had wanted different federal rules they would have worded them differently. If courts had that behind them, they would be more inclined to overturn things that are true shams. He noted if he were still a commissioner, he would recommend a "shocks the conscience" standard. Mr. Fatale discussed Massachusetts sham transactions cases and statutes and thought the generally worded statute had a deterrent effect and was useful in settlements and cases.

New Business

Mr. Hoyt mentioned the group is looking for a new vice chair, and asked for volunteers.

Given the status of current projects, the staff of the MTC believed there could be capacity for an additional project and asked the committee to consider options or issues that they may want to address. Mr. Horwitz proposed a project looking at *Wayfair* and states adoption of the *Wayfair* rules and the expectation of taxpayer compliance at the level states have appeared to be expecting it. His experience is that it has been slightly counterproductive, and he recommends considering the possibility of creating a uniform and somewhat longer approach to full compliance to *Wayfair* collection. Nancy Prosser, Tex., recommended looking at litigation risks of *Wayfair* to see if the group could bring all the stakeholders together and figure out unanswered questions. One question involves nexus and the presence of an employee in the state. She sees great benefit to working out the answers as a group. John Valentine, Utah, also recommended looking at how information would be shared. Gil Brewer, Wash., moved to do an informational look into the post-*Wayfair* world. The motion passed by show of hands.

Adjourn

The meeting adjourned at 3:38pm.